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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD P. SMOOT and
BARBARA M. SMOOT,
Plaintiffs and Appellants,

vs. —

HOWARD L. LUND and
GWEN C. LUND,
Defendants and Respondents.

Case
No. 9515

FILED
JUN 29 1961

Supreme Court, Utah

RESPONDENTS' BRIEF

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Case
No. 9515

RESPONDENTS' BRIEF

STATEMENT OF FACTS

Respondents do not concur in the Preliminary Statement or Statement of Facts as propounded by the Appellants, because these “statements” embrace conclusions and allegations of the Appellants which are supported only by the unverified pleading of the Appellants; further, the Statement of Facts erroneously considers the facts alleged in the unverified Amended Complaint as established for purposes of this appeal. The Respondents also consider facts essential in a consideration of this case to have been omitted.

According to the notice of appeal filed by the plaintiffs (appellants) herein, they appeal (1) from the summary judgment entered on June 5, 1961, in favor of defendants (respondents), (2) from the order of the court denying plaintiffs' motion to reconsider the summary judgment and for a new trial, and (3) from the court's order granting defendants' Motion to Strike entered March 23, 1961. (R. 66) However, there is serious doubt that the brief of the plaintiffs is directed at (2) or (3) above, and we must conclude therefore that the appeal insofar as it relates to these points has been abandoned. In fact, our examination of the record fails to reveal that plaintiffs' motion to reconsider the summary judgment and for a new trial has been denied.

On or about February 9, 1959, the defendants executed a promissory note in favor of Richard P. Smoot, promising to pay \$27,500.00 on or before February 10, 1961, and agreeing to certain further conditions regarding payment and security therefor (R. 7, 8); on the due date the balance of the original sum then owing was \$15,200.00. (R. 34, 35)

Hardly had the promissory note had time to metamorphose from time to demand paper, when counsel for the plaintiffs, on Saturday, February 11, 1961, executed a complaint against defendants, claiming as a second cause of action that the promissory note in question did not express the actual agreement of the parties by reason of mutual mistake, or mistake of plaintiffs and fraud of both defendants. (R. 3) The plaintiffs prayed for (1)

reformation of the instrument; (2) judgment for the balance due, and (3) exemplary damages.

On March 6, 1961, plaintiffs secured a writ of attachment, attaching the property of the defendants. (R. 11, 16)

Thereupon, the defendants moved to strike all provisions of plaintiffs' second cause of action alleging or inferring fraud, and upon which they claim exemplary damages (R. 14) which motion was granted. (R. 21)

On March 30, 1961, and April 10, 1961, the balance due on the promissory note was tendered to plaintiffs by defendants (R. 34), but the plaintiffs objected to the form of the tender and requested "the cash or cashier's check be formally tendered or paid into court." (R. 36)

Defendants' motion to deposit the balance due under the note (R. 38), and for summary judgment on plaintiffs' second cause of action (R. 37) was granted by the court on June 5, 1961, following hearing on May 23, 1961 (R. 55, 56), the actual deposit being made on the latter date. (R. 52)

The motions of the defendants to strike the fraud allegations, and for summary judgment, granted by the court, relate solely to plaintiffs' second cause of action as contained in the original complaint. The amended complaint of the plaintiff was not the basis for the motions aforementioned. Repeated reference to the amended

complaint by the appellants as forming a part of this appeal is not supported by the record.

We submit that the amended complaint of plaintiffs is not before the court on this appeal; however, should this court conclude otherwise, the arguments made hereafter apply with equal force to the amended complaint as to the original complaint.

The respondents claim the lower court did not err in granting the motions which are the subject of this appeal, for the following reasons :

1. Plaintiffs, by securing a writ of attachment, and attaching the property of defendants, have elected a remedy in contract, according to the terms of the promissory note; they are barred from the remedies of reformation or exemplary damages arising from alleged tortious conduct of the defendants.

2. Defendants have made a valid tender in satisfaction of plaintiffs' second cause of action, and plaintiffs failed to comply with the Utah law regarding due objection thereto.

3. Defendants' motion for summary judgment was duly supported by affidavit; plaintiffs failed to file a traverse thereto.

4. Plaintiffs have failed to plead a cause of action for reformation of the promissory note in question.

5. Plaintiffs are not entitled to reformation of the promissory note inasmuch as no demand was made for reformation of the instrument until this action was filed.

STATEMENT OF POINTS

POINT I

PLAINTIFFS BY THEIR ELECTION HAVE AFFIRMED THE PROMISSORY NOTE AND ARE NOT ENTITLED TO DAMAGES OR REFORMATION.

POINT II

SUMMARY JUDGMENT WAS PROPERLY GRANTED IN VIEW OF PLAINTIFFS' FAILURE TO TRAVERSE DEFENDANTS' PROOF.

POINT III

DEFENDANTS HAVE MADE A LAWFUL AND BINDING TENDER IN SATISFACTION OF THE SECOND CAUSE OF ACTION.

POINT IV

PLAINTIFFS HAVE FAILED TO PLEAD A CAUSE OF ACTION FOR REFORMATION OF THE PROMISSORY NOTE IN ISSUE.

POINT V

PLAINTIFFS' COMPLAINT IS DEFECTIVE BECAUSE IT FAILED TO ALLEGE A DEMAND FOR CORRECTION OF THE PROMISSORY NOTE, AND REFUSAL THEREOF.

POINT VI

THE PLAINTIFFS HAVE FAILED TO SHOW THE LOWER COURT WAS IN ERROR IN GRANTING SUMMARY JUDGMENT.

ARGUMENT

POINT I

PLAINTIFFS BY THEIR ELECTION HAVE AFFIRMED THE PROMISSORY NOTE AND ARE NOT ENTITLED TO DAMAGES OR REFORMATION.

It is elementary that a litigant must choose between two or more available remedies which are inconsistent. The Utah case of *Cook v. Covey-Ballard Motor Co.*, (Utah) 253 P. 196, states the rule as follows:

“The doctrine of an election rests upon the principle that one may not take contrary positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves a negation or repudiation of the other, the deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. * * *”

In the instant case the plaintiffs in their second cause of action ask for three remedies, growing out of the same allegations, namely: (1) a judgment for the balance due on the promissory note; (2) exemplary damages for the alleged tort of the defendants and (3) reformation of the said note. It is obvious that these remedies are inconsistent in nature, the remedy in (1) being based upon affirmance of the promissory note; while (2) is an action ex delicto; and (3) is an action in equity in disaffirmance of the contract.

Following the filing of the complaint, the plaintiffs chose to attach the property of the defendants. (R. 11, 12, 16, 17)

Rule 64C (a) of the Utah Rules of Civil Procedure, provides for the extraordinary remedy of attachment as follows :

“The plaintiff, at any time after the filing of the complaint, in an action upon a judgment, upon any contract express or implied, or in an action to recover damages for any tort committed by a non-resident of this state against the person or property of a resident of this state, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered in such action, * * * .”

Three actions, therefore, will support an attachment, to wit: (1) An action upon a Judgment; (2) An action upon any contract, express or implied; and (3) An action to recover damages for any tort committed by a nonresident of this state against the person or property of a resident of this state. This case before the court involves no action upon a judgment, nor an action to recover damages for any tort committed by a nonresident, for plaintiffs specifically admit that defendants are residents of Utah. (R. 2) Therefore, the attachment by the defendants in this case must have been “* * * in an action upon * * * [a] contract, express or implied * * * .”

By the attachment of defendants' property, we submit that plaintiffs have elected a remedy based upon con-

tract and have waived any action in tort for exemplary damages or any action in equity for reformation of the instrument. The test of whether there has been a conclusive election has been stated by this court as follows:

“The true rule seems to be (1) that there must be, in fact, two or more coexisting remedies upon which the party has the right to elect; (2) the remedies thus open to him must be alternative and inconsistent; and (3) he must by actually bringing an action *or by some other decisive act*, with knowledge of the facts, indicate his choice between these inconsistent remedies. * * * (Emphasis added)

See *Cook v. Covey-Ballard Motor Co.*, (Utah) 253 P. 196.

According to 18 Am. Jur., Election of Remedies, p. 164:

“The doctrine of election of remedies is fully applicable where one of the modes of redress chosen is attachment or garnishment.”

That resort by the plaintiffs to the extraordinary writ of attachment constitutes a waiver of an action in tort for exemplary damages is sustained by ample authority. See 4 Am. Jur., Attachment and Garnishment, Section 15, p. 560; *Steiner v. Rowley*, (Calif.) 221 P. 2d 9; *Estrada v. Alvarez*, (Calif.) 240 P. 2d 278; *Cleveland v. San Antonio Building and Loan Association et al.*, (Texas) 223 S. W. 2d 226; *Morgan's Louisiana & T. R. S. S. Co. v. Stewart* (La.) 44 So. 138; *Stanhope v. Swafford* (Iowa) 42 N.W. 450; *McCall v. Superior Court* (Calif.) 36 P. 2d 642.

Steiner v. Rowley (Calif.) 221 P. 2d 9, was an action to recover a broker's commission, in which plaintiffs pleaded alternative causes in tort and contract. The plaintiffs in addition to pleading the inconsistent counts obtained an attachment. The court stated:

“Pleading the two causes of action in the alternative did not constitute an election because inconsistent counts are permissible, * * * (citing cases) * * * and an election cannot be forced by demurrer. * * * But the Steiners also obtained an attachment. This was a positive act of a plaintiff ‘in pursuit of * * * (the contractual remedy) * * * whereby he has gained * * * advantage over the other party * .’ *De Laval Pac. Co. v. United C. & D. Co.*, 65 Cal. App. 584, 586, 224 P. 766, 767. The Steiners were thereafter estoppel (sic) to allege a cause of action in tort, and the demurrer as to the fourth count was properly sustained.”

We submit that exemplary damages are not recoverable in actions for breach of contract; and even though a tortious act may be shown, if the action proceeds on the contractual obligation no exemplary damages are recoverable.

According to *Engen v. Merchants' and Manufacturers State Bank* (Minn.) 204 N.W. 963:

“An action to recover damages for fraud inducing the making of a contract is not based on the contract but on tort.”

The Utah case of *Haycraft v. Adams*, 82 Utah 347, 24 P. 2d 1110, defines exemplary damages as follows:

“ ‘Exemplary, punitive, or vindictive damages are such damages as are in excess of the actual loss, and are allowed where a tort is aggravated by

evil motive, actual malice, deliberate violence, oppression or fraud.' *Murphy v. Booth*, 36 Utah 285, 103 P. 768, 770.'"

The plaintiffs by virtue of the attachment aforementioned have made a conclusive election to proceed *ex contractu* and have waived all right to recover the damages claimed for the alleged tort of the defendants. See *Steiner v. Rowley*, *supra*. The lower court properly awarded summary judgment for the balance due under the note in question, there being no further basis for recovery under the contract.

The remedy of reformation of the promissory note as sought by the plaintiffs is equally inconsistent with the election of attachment in an action upon an express contract, the promissory note. The two remedies are inconsistent, the action for reformation disaffirming the contract, and the attachment being a redress in affirmance thereof. See in this connection 18 Am. Jur., Election of Remedies, Sections 29, 30, p. 150, Section 33, p. 154; *Montalbano v. Automobile Insurance Co. of Hartford, Conn.* (S. Car.) 62 S.E. 2d 829; *Hallidie v. Enginger* (Calif.) 166 P. 1; *Continental Grain Company v. The First National Bank of Memphis, et al.*, 162 F. Supp. 814; *Leaksville Light and Power Co. v. Georgia Casualty Co.* (N. Car.) 137 S.E. 817. Furthermore, the plaintiffs have shared in benefits or the fruits of the agreement, having received \$12,300 in payments under the note, and by virtue thereof have recognized the express terms of that instrument.

The order of the lower court, dated March 23, 1961 (R. 21) granted defendants' motion to strike all provisions of plaintiffs' second cause of action alleging or

inferring fraud. Plaintiffs' brief in no wise challenges this order; the inescapable conclusion, therefore, is that the allegation or ground of fraud upon which the plaintiffs claim reformation is no longer before the court.

By attaching the property of the defendants, the plaintiffs elected to affirm the promissory note. The orders of the court granting defendants' motion to strike the fraud allegations of plaintiffs' second cause of action and the motion for summary judgment were not in error in view of the election of remedy by the plaintiffs and the tender of the balance due on the promissory note by the defendants.

POINT II

SUMMARY JUDGMENT WAS PROPERLY GRANTED IN VIEW OF PLAINTIFFS' FAILURE TO TRAVERSE DEFENDANTS' PROOF.

The defendants' motion for summary judgment was made pursuant to Rule 56, of the Utah Rules of Civil Procedure. Rule 56 (a) thereof provides:

“A party seeking to recover upon a claim, counterclaim or cross claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.”

The motion of the defendants' was supported by affidavit to the effect that defendants had offered to pay by cashier's check \$15,200, the full balance due on the promissory note in question, plus interest to the date of

payment; that plaintiffs' attorney had objected to the form of the tender; and that no presentment or demand was made after the due date except by the service of process. (R. 34, 35)

As indicated in this brief heretofore we contend that plaintiffs elected a remedy in contract; therefore, the only question of fact before the lower court was the obligation due under the promissory note in question. By affidavit the defendants have established the balance due thereunder, refusal of the plaintiffs to accept the same, and the record indicates the deposit in court of that sum pursuant to request of the plaintiffs. (R. 52, 36)

In *Dupler v. Yates*, (Utah), 351 P. 2d 624, this court held:

“Certainly if the summary judgment procedure is to be effective, it must be held that when adequate proof is submitted in support of the motion, the pleadings are not sufficient to raise an issue of fact.

* * *

Upon motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so.”

See also *Pender v. Alix* (Utah) 354 P. 2d 1066.

Plaintiffs in this case filed no traverse to the affidavit of the defendants in support of the motion for summary judgment, and all of the allegations of plaintiffs in their

complaint are unverified. The court therefore had no issue of fact before it, and properly awarded summary judgment in favor of defendants.

POINT III

DEFENDANTS HAVE MADE A LAWFUL AND BINDING TENDER IN SATISFACTION OF THE SECOND CAUSE OF ACTION.

On March 30, 1961, and again on April 10, 1961, defendants, by letter, tendered the balance and interest due under the promissory note in question to plaintiffs. (R. 34) The letter of April 10, 1961, reads in part:

“You will please take notice that Howard L. Lund and Gwen C. Lund offer to pay, by cashier’s check the sum of \$15,200 plus interest to date of payment in full payment and satisfaction of that note in favor of Richard P. Smoot dated February 9, 1959, executed by Mr. and Mrs. Lund.” (R. 35)

The reply of plaintiffs stated in part:

“* * * I wish to object to the form of the tender and request that the cash or cashier’s check be formally tendered or paid into court.” (R. 36)

Sections 78-27-1 and 3, U. C. A. 1953, provide:

78-27-1. “An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.”

78-27-3. “The person to whom a tender is made must, at the time, specify any objection he may

have to the money, instrument or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards.”

Plaintiffs made no objection to the amount of money tendered, nor did they specify the amounts or terms required. In view of Section 78-27-3, *supra*, plaintiffs cannot now object to the amount of money tendered, for their failure to object constitutes a waiver thereof.

Appellants’ brief, particularly Point I thereof, completely overlooks or avoids the legal principle applicable here and becomes entangled in an analysis of Rule 68 of the Utah Rules of Civil Procedure, which rule has no relation to this case. The defendants tendered the sums in question pursuant to Sections 78-27-1 and 3, *supra*, and deposited the actual monies in court pursuant to Section 78-27-4, U. C. A. 1953. Plaintiffs then failed to make timely objections to the tenders made, other than as to form; wherein can the plaintiffs now complain?

The fact of the tenders aforementioned was made part of the affidavit which supported defendants’ motion for summary judgment. (R. 37) Plaintiffs, for reasons best known to them, failed to traverse the affidavit.

We respectfully submit granting summary judgment under such circumstances was anything but error.

POINT IV

PLAINTIFFS HAVE FAILED TO PLEAD A CAUSE OF ACTION FOR REFORMATION OF THE PROMISSORY NOTE IN ISSUE.

Persuasive authority supports the legal principle that a moving party in a suit for reformation must negative negligence. The case of *Cherokee Oil and Gas Co. v. Lucky Leaf Oil and Gas Co.*, 116 Okla. 121, 242 Pac. 214, supports the conclusion that an allegation that a written instrument does not express the contract of the parties, in an action for reformation, does not state a cause of action, unless the pleader negatives negligence on his part. In that case the court held:

“* * * The pleader is not entitled to reformation, unless he shows himself free from negligence in attaching his signature to the written agreement, if he claims that it does not express the true agreement of the parties. The pleader must show that he was not guilty of a want of ordinary care for the protection of his own business interest at the time he attached his signature to the written agreement. * * *”

The *Cherokee case* is applicable here. The plaintiffs do not negative negligence on their part in seeking reformation. Plaintiffs must show they are not guilty of want of ordinary care in conveying valuable consideration for the note in question. This they have not done and their second cause of action fails to state a cause of action for reformation. The trial court properly granted summary judgment.

The concurring opinion of Mr. Justice Wolfe in *Garner v. Thomas, et al.*, 94 Utah 295, 78 P. 2d 529, is poignant to the legal proposition here advocated, wherein it is stated:

“* * * There is a division of authority on the question of whether the moving party in a suit for reformation must negative negligence or only gross negligence. See the well considered notes in 28 L. R. A., N. S. 882; 45 ALR 700; 65 Am. St. Rep. 485; 23 R. C. L. 360.

“* * * Reams v. McMinville, 153 Tenn. 408, 284 S. W. 382, 384 lays down the sensible rule that, ‘The pleader must explain how the mistake was made, and show that he was without fault in the matter.’ In Cochran v. Burns, 91 N. J. Eq. 7, 107 A. 476, it is held that a complaint was good although no facts or statements as to how the mistake occurred are included, except that it was a material mistake and the written agreement was not the intended agreement. *If this case decides that the pleading need not negative negligence, it stands almost alone.*

“Seemingly in this state the rule is that reformation of a written instrument will not be decreed where the party seeking reformation is guilty of negligence only. Nordfors v. Knight, 90 Utah 114, 60 P. 2d 1115; George v. Fritsch Loan & Trust Co., 69 Utah 460, 256 P. 400. * * *” (Emphasis added)

We recognize the apparent conflict in authorities as to whether the moving party in a suit must negative negligence or only gross negligence. We submit that the cases herein cited support the better rule requiring the negating of negligence. In any event, the plaintiffs, in pleading for reformation, negative neither negligence nor gross

negligence; in such failure they do not state a cause of action for reformation. Therefore, the summary judgment was properly granted.

POINT V

PLAINTIFFS' COMPLAINT IS DEFECTIVE BECAUSE IT FAILED TO ALLEGE A DEMAND FOR CORRECTION OF THE PROMISSORY NOTE, AND REFUSAL THEREOF.

According to 45 Am. Jur., Reformation of Instruments, Section 104, p. 646:

“A complaint for reformation must allege a demand upon the defendant for correction of the instrument and a refusal thereof, unless the case is brought within an exception to the general rule, as where from the facts alleged it appears that a demand would have been a useless ceremony.”

Cleveland v. Bateman, (N. M.), 158 P. 648.

In the instant case the complaint alleges no demand for correction, or refusal thereof, nor is there a showing that the demand would have been a useless act. The action for reformation is the main purpose of the second cause of action, an integral part of the lawsuit, and not such a mere incident to the action of the plaintiffs so as to relieve them of the necessity of pleading the demand and refusal.

In this connection it is observed that the complaint of plaintiffs is the first and only request for reformation — and this comes two years after the receipt of the promissory note by plaintiffs; the day after the promis-

sory note has matured by its own terms; and at a time subsequent to part performance of the promissory note by defendants, and retention thereof by the plaintiffs. Reformation being equitable relief requires good faith, diligence, and clean hands on the part of the moving party. We question the standing of the plaintiffs to urge at this time, and under the conditions noted, the remedy of reformation; and in this respect we submit the summary judgment was properly granted.

POINT VI

THE PLAINTIFFS HAVE FAILED TO SHOW THE LOWER COURT WAS IN ERROR IN GRANTING SUMMARY JUDGMENT.

It is fundamental that one prosecuting an appeal has the burden to show error. By virtue of the authorities and reasoning heretofore cited we submit the lower court properly granted summary judgment, and we also submit that plaintiffs have failed to discharge their burden.

We are of the conviction that all matters raised in appellants' brief have been met in the points set forth heretofore, and that plaintiffs in prosecuting their appeal have ignored the doctrine of election or remedies, rules concerning summary judgment, and the necessary requisites for the relief of reformation. In addition, thereto, however, other deficiencies are noted in the appeal procedure.

First, no appeal has been taken from the order of the lower court, dated June 5, 1961 (R. 56, 57). This order

grants the motion to deposit tender and requires certain releases of property and security, and grants summary judgment. We submit the plaintiffs are bound by that order regardless of this appeal, which makes this prosecution a useless act.

Second, as heretofore noted, the plaintiffs' brief has failed to show any error in the lower court's order granting defendants' motion to strike the allegations of fraud in the second cause of action. (R. 21) These allegations therefore are not properly before this court, and the plaintiffs' attempt in the resurrection thereof in their brief is defective.

Third, we have heretofore submitted that all determinations of the lower court before this court on appeal related to the second cause of action of the original complaint. The order granting the motion to strike (R. 21) and the summary judgment (R. 55) so indicate. In plaintiffs' brief we now note the inclusion of matters which arise in the amended complaint of the plaintiffs, which was not filed until the same day the motion for summary judgment was argued, May 23, 1961. (R. 42-51, 56)

In the brief of appellants, Point II(B), it is claimed that the lower court erred in dismissing as a matter of law the claim of plaintiffs to counsel fees and costs, because of the alleged omission in the note of any provision allowing attorneys' fees in event of default and collection. No law is cited by the plaintiffs in support of this proposition. Furthermore, this claim to attorneys' fees and costs is entirely foreign to the original complaint.

Fourth, the basis upon which it is claimed that Plaintiff Barbara M. Smoot is entitled to anything under the second cause of action is not readily apparent. She was not even a party to the transaction.

The record does not show that defendant Gwen C. Lund took any part in the incidents of the negotiations which are termed fraudulent by plaintiffs. How can plaintiffs under any condition contend that she is not entitled to the summary judgment?

CONCLUSION

The lower court did not err in granting summary judgment and the defendants' motion to strike, and defendants therefore pray for affirmance of the decision of the lower court and costs.

Respectfully submitted,

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